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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
8

9 ARIZONA CONTRACTORS)
ASSOCIATION, INC., an Arizona non-)
10 profit corporation; ARIZONA)
EMPLOYERS FOR IMMIGRATION)
11 REFORM, INC., an Arizona non-profit)
corporation; CHAMBER OF)
12 COMMERCE OF THE UNITED)
STATES OF AMERICA, a Washington)
13 D.C. non-profit corporation; ARIZONA)
CHAMBER OF COMMERCE, an)
14 Arizona non-profit corporation;)
ARIZONA HISPANIC CHAMBER OF)
15 COMMERCE, INC., an Arizona non-)
profit corporation; ARIZONA FARM)
16 BUREAU FEDERATION, an Arizona)
non-profit corporation; ARIZONA)
17 RESTAURANT AND HOSPITALITY)
ASSOCIATION, an Arizona non-profit)
18 corporation; ASSOCIATED MINORITY)
CONTRACTORS OF AMERICA, an)
19 Arizona non-profit limited liability)
company; ARIZONA ROOFING)
20 CONTRACTORS ASSOCIATION, an)
Arizona non-profit corporation;)
21 NATIONAL ROOFING)
CONTRACTORS' ASSOCIATION, an)
22 Illinois not-for-profit corporation;)
WAKE UP ARIZONA! INC., an)
23 Arizona non-profit corporation; and)
ARIZONA LANDSCAPE)
24 CONTRACTORS ASSOCIATION,)
INC., an Arizona non-profit corporation,)

25 Plaintiffs,)
26)
27)
28)

vs.)

No. CV07-1355-PHX-NVW (lead)
No. CV07-1684-PHX-NVW (member)

ORDER

1 JANET NAPOLITANO, Governor of)
the State of Arizona; TERRY)
2 GODDARD, Attorney General of the)
State of Arizona,)
3)

Defendants.)
4)

CHICANOS POR LA CAUSA, INC.;)
5 and SOMOS AMERICA,)
6)

Plaintiffs,)
7)

vs.)
8)

JANET NAPOLITANO, in her official)
9 capacity as Governor of the State of)
Arizona; TERRY GODDARD, in his)
10 official capacity as Attorney General of)
the State of Arizona; and GALE)
11 GARRIOTT, in his official capacity as)
the Director of the Arizona Department)
12 of Revenue,)
13)

Defendants.)
14)

15 **I. Nature of the Motion and Related Proceedings**

16 Plaintiffs have appealed the December 7, 2007 judgment dismissing this action
17 without prejudice for lack of a justiciable case or controversy against these Defendants.
18 They now seek an injunction preventing the Defendants from implementing or enforcing
19 the Legal Arizona Workers Act, A.R.S. §§ 23-211 through 214 (the Act), for the duration
20 of the appeal. Fed. R. Civ. P. 62(c). (Doc. ## 91 and 94.) The court's corrected Findings
21 of Fact and Conclusions of Law (Doc. # 87) and Judgment thereon (Doc. # 85)
22 principally concluded: (1) that Plaintiffs lack standing based on imminent threat of
23 enforcement, as they proved no threat by anyone, including the Defendants; (2) that
24 Plaintiffs proved cost-of-compliance injury from forced participation in E-Verify
25 sufficient for standing if they sued a proper defendant; and (3) that redress would not be
26 effective against the Defendants Governor, Attorney General, and Director of the
27 Department of Revenue because the Act does not give them the enforcement power that
28 coerces participation in E-Verify.

1 Both groups of Plaintiffs have filed new actions on December 10 and 12, 2007,
2 adding one or all of the county attorneys as defendants and seeking interim injunctive
3 relief identical to what is sought here as an injunction pending appeal. Those actions are
4 now consolidated under *Arizona Contractors Association, Inc. v. Candelaria*, No. CV 07-
5 2496 PHX-NVW ("*Arizona Contractors II*"). On December 18, 2007, the court held a
6 case management conference and set a hearing for January 16, 2008, on the motions for
7 preliminary injunction.

8 Plaintiffs' motions for temporary restraining order in *Arizona Contractors II* were
9 heard on December 18, 2007. The county attorney Defendants acknowledged that it
10 would take them weeks or months to investigate complaints and prepare to initiate any
11 proceedings under the Act. They avowed that, though they will carry out their duties
12 without intentionally delaying, they could and would bring no proceedings before
13 February. If, because of extraordinary or unforeseeable events, they were able and
14 thought it necessary to bring proceedings before then, they would advise the court and
15 Plaintiffs in time for them to seek a temporary restraining order. Thus, the immediate
16 relief against enforcement sought in these motions and by the motions for temporary
17 restraining order in *Arizona Contractors II* is now unnecessary and could not become
18 necessary until February at the earliest. By that time the court will have heard and ruled
19 on the motions for preliminary injunction in *Arizona Contractors II*.

20 Despite that withdrawal of any need for interim injunctive relief against the
21 enforcing officers before February, Plaintiffs continue to seek an immediate injunction
22 against compliance with E-Verify. They no longer seek an order against anyone who will
23 do anything to them during the term of the injunction. Rather, they effectively seek a
24 declaratory judgment to commence and run for a limited time period, but with permanent
25 effect thereafter, absolving them from any liability for not using E-Verify. The relief
26 sought in these motions for injunction pending appeal and in the motions for temporary
27 restraining order in *Arizona Contractors II* has been transformed.

28 By separate order this day, the motions for temporary restraining order in *Arizona*

1 *Contractors II* are denied for the following reasons: (1) there is insufficient likelihood
2 that Plaintiffs will succeed on issues that demand remedies in the short term; (2) it may be
3 improper to issue a temporary restraining order that is really a declaratory judgment; (3)
4 the balance of hardships tips against Plaintiffs rather than for them; and (4) there will be
5 full opportunity at the January 16, 2008 preliminary injunction hearing to address issues
6 that may occasion interim relief thereafter.

7 **II. Standards for Injunction Pending an Appeal**

8 An injunction pending appeal under Federal Rule of Civil Procedure 62(c) is an
9 extraordinary remedy that should be granted sparingly. *Reading & Bates Petroleum Co.*
10 *v. Musslewhite*, 14 F.3d 271, 275 (5th Cir. 1994) (“Stays pending appeal constitute
11 extraordinary relief.”); *United States v. Texas*, 523 F. Supp. 703, 729 (E.D. Tex. 1981)
12 (“Since such an action interrupts the ordinary process of judicial review and postpones
13 relief for the prevailing party at trial, the stay of an equitable order is an extraordinary
14 device which should be sparingly granted.”).

15 Four factors must be considered on Rule 62(c) motions: “(1) whether the stay
16 applicant has made a strong showing that he is likely to succeed on the merits; (2)
17 whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the
18 stay will substantially injure the other parties interested in the proceeding; and (4) where
19 the public interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *NRDC v. Winter*,
20 502 F.3d 859, 863 (9th Cir. 2007) (noting the importance of the public interest factor)
21 (citations omitted). *See also Alaska Conservation Council v. U.S. Army Corps of Eng’rs*,
22 472 F.3d 1097, 1100 (9th Cir. 2006) (“[T]he moving party [must] demonstrate ‘either a
23 combination of probable success on the merits and the possibility of irreparable injury or
24 that serious questions are raised and the balance of hardships tips sharply in his favor.’”).

25 “The requirement of a ‘strong showing’ of likelihood of success on the merits is
26 more stringent than the ‘reasonable probability’ standard that is applicable to an
27 application for a preliminary injunction.” *Davis v. Meyers*, 101 F.R.D. 67, 69 (D. Nev.
28 1984) (citing *Bayless v. Martine*, 430 F.2d 873, 879 (5th Cir. 1970)). It is sometimes said

1 that the “success on the merits factor cannot be rigidly applied,” and that “district courts
2 properly ‘stay their own orders when they have ruled on an admittedly difficult legal
3 question.’” *Pac. Merch. Shipping Ass’n v. Cackette*, No. Civ. S-06-2791, 2007 U.S.
4 Dist. LEXIS 76933 at *6, 2007 WL 2914961 at *2 (E.D. Cal. Oct. 5, 2007) (citations
5 omitted). “However, the *Hilton* test is only to be reformulated in this manner when the
6 movant has made a strong showing as to the other three *Hilton* factors.” *Digital*
7 *Commc’ns. Network, Inc. v. AB Cellular Holding LLC*, Case No. 99-5418, 1999 U.S.
8 Dist. LEXIS 15107 at *18, 1999 WL 1044234 at *6 (C.D. Cal. Aug. 19, 1999) (“Because
9 Plaintiffs have not made a strong showing as to the other three *Hilton* factors, the Court
10 declines to give the Plaintiffs a ‘break’ on the question of strong likelihood of success on
11 the merits.”) (citations omitted).

12 “In a case in which ‘the moving party seeks to stay governmental action taken in
13 the public interest pursuant to a statutory or regulatory scheme,’ the injunction should be
14 granted only if the moving party meets the more rigorous likelihood-of-success standard.”
15 *Bery v. City of New York*, 97 F.3d 689, 694 (2d Cir. 1996) (citing *Plaza Health Labs., Inc.*
16 *v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989)); *Tunick v. Safir*, 209 F.3d 67, 70 (2d Cir.
17 2000). The movant also must make a “strong showing” of likelihood of success where
18 the irreparable injury it claims is merely prospective monetary damages. “Traditionally,
19 the irreparable injury contemplated by Rule 62(c) is that which will make the appeal
20 moot. Thus, prospective monetary damage is *not* irreparable injury.” *Stop H-3 Ass’n v.*
21 *Volpe*, 353 F. Supp. 14, 18 (D. Haw. 1972) *rev’d on other grounds*, 533 F.2d 434 (9th
22 Cir. 1976) (citations omitted).

23 In this case, an injunction pending appeal is not needed to protect the jurisdiction
24 of the appellate courts from mootness or other threat. Appellate jurisdiction of this case is
25 secure whether or not the Act is enjoined in the meantime. Rather, the injunction
26 deprives the Act’s beneficiaries of its substantive protection for the extended period of an
27 appeal and causes other harms, despite the court’s probable lack of jurisdiction to give
28 that substantive relief. This suggests that a strong likelihood of success on the merits

ought to be necessary to issue an injunction pending appeal that grants substantive relief.

Another circumstance of this case also suggests that more be demanded for an injunction pending appeal. Plaintiffs' new suit *Arizona Contractors II* is identical, except that it is against proper defendants and has subject matter jurisdiction, and is pending and ready for a preliminary injunction ruling in January.

III. Plaintiffs Have Little Hardship from Participating in E-Verify, and the Balance of Hardships is Strongly Against an Injunction Pending Appeal

A. Plaintiffs' Hardship is Minimal

Plaintiffs offer mostly sweeping generalities for the hardship they must show to warrant an injunction pending appeal or a temporary restraining order before the January 16, 2008 preliminary injunction hearing in *Arizona Contractors II*. The hardship comes down to nothing more concrete than the expense of using E-Verify. Counsel admitted at trial that no Plaintiff lacks a computer or internet access. The only cost is employee time in learning the program, submitting the names of new hires after January 1, 2008, and assisting new employees who wish to communicate with the federal government to resolve out-of-date government records. That would be a few hundred to a few thousand dollars a year for the large majority of employers. (Doc. # 87 at 8, 11.)

If Plaintiffs bear this hardship of complying with the Act, there will be no other hardship because the Act itself effectively assures that compliance with E-Verify will avoid virtually all license sanction proceedings and defeat any that are brought. (Doc. # 87 at 9, 18–19.) If lawful workers with tentative nonconfirmations show the basis, the E-Verify process itself assures that their government records will be updated and their employers will not be charged with violating the Act.

The hardship of using E-Verify is an increment to the already pervasive regulation of labor and employment in our society. The cost of it meets the minimum for standing, but no Plaintiff showed at trial that the actual cost will be material in the context of its business operations. *See Yniguez v. Mofford*, 730 F. Supp. 309, 317 (D. Ariz. 1990) *rev'd on other grounds*, 939 F.2d 727 (9th Cir. 1991) (“While Yniguez has established a

1 sufficient threat of enforcement to provide an actual controversy for purposes of Article
2 III and the Declaratory Judgment Act, she has not established an enforcement threat
3 sufficient to warrant injunctive relief.”); *Lawson v. Hill*, 368 F.3d 955, 959 (7th Cir.
4 2004) (“Even if we are wrong to suppose the risk of prosecution too remote to confer
5 standing to sue . . . the district judge was right not to enter an injunction [A]n
6 injunction is an extraordinary remedy.”). Moreover, complying with E-Verify,
7 unwelcome though it may be for other reasons, will have off-setting business benefits for
8 Plaintiffs. If historical statistics hold true, 92% of them will find it easier than the I-9
9 process alone. An overwhelming majority will find it an effective and reliable tool for
10 employment verification. All of them will rate the program “Excellent,” “Very Good,” or
11 “Good.” (Doc. # 87 at 8.) The one thing it will not do is allow them to keep hiring nearly
12 as many unknown unauthorized aliens, but that is not a “hardship” that could count under
13 the law.

14 The hardship that could count from complying with the Act while the court of
15 appeals considers this case, which is having to participate in E-Verify, is insignificant in
16 practical terms for all but the fewest of businesses. No Plaintiff presented evidence at
17 trial, or credible evidence since trial, that the cost of E-Verify compliance for it or any of
18 its members will be significant.

19 Moreover, since no county attorney could bring an enforcement proceeding before
20 completion of preliminary injunction proceedings in *Arizona Contractors II*, the
21 justification for emergency injunctive relief or a restraining order — to stop someone
22 from doing something harmful — is absent. Plaintiffs now reach beyond asking for
23 protection from imminent government action and instead are demanding a binding
24 adjudication that absolves them from the legal effect of the Act. Plaintiffs offer no
25 authority for this kind of declaratory judgment relief at the commencement of a case, or
26 upon the appeal of a case where jurisdiction was lacking, when no overt acts of harm are
27 threatened by any Defendant.
28

1 **B. An Injunction Will Gravely Injure the Interests of the State, the**
2 **Interests of Others, and the Public Interest**

3 Plaintiffs' motions wholly fail to acknowledge the harm to the interests of the
4 State, the interests of others, and the public interest from an injunction pending appeal or
5 temporary restraining order. Those ignored harms can be listed in somewhat ascending
6 order as follows.

7 1. The State's expenditure to inform every employer by October 1, 2007, of
8 the Act and of the obligation to comply with E-Verify after December 31, 2007, would be
9 wasted. 2007 Ariz. Sess. Laws, Ch. 279, § 3. (Joint Statement of Facts, Doc. # 72
10 ("Facts") Ex. 6.) Giving individuals actual notice of the law, when it begins, and how to
11 avoid risk by complying with E-Verify, was critical to the legislature's purpose of
12 achieving effective deterrence with the fewest number of employers suffering actual
13 sanctions. If the effective date of the Act is delayed by court order, that legislative
14 purpose of fairness by giving individual notices would be defeated unless a new notice is
15 sent when the Act is allowed to go into effect. This suggests that such delay must be
16 denied or that Plaintiffs must post a bond to cover the cost of a new notice under Rule
17 62(c) in the appeal or Rule 65(c) in *Arizona Contractors II*.

18 At the December 18, 2007 hearing, the Executive Branch of the State of Arizona
19 spoke in two voices. Counsel for the Attorney General took the position that no second
20 notice would be necessary after an injunction is lifted because the Act does not speak to it
21 and no money is appropriated to pay for it. Counsel for the Governor took the position
22 that a second notice would be necessary to repair the harm of an injunction. The court
23 concludes that the Governor has the better understanding of the Act and of the
24 consequences of an interim injunction. This either weighs against an interim injunction
25 or weighs in favor of requiring a bond from Plaintiffs to cover the cost of a second notice.

26 2. Confusion would arise among employers, with the prospect of serious
27 prejudice to some. Of approximately 150,000 employers in Arizona, the large majority
28 apparently have not yet enrolled in E-Verify. An injunction easily could cause many to

1 think they are excused from the Act and from E-Verify compliance, perhaps permanently,
2 even though this is not a class action and an injunction would protect only the Plaintiffs.
3 If Plaintiffs' case fails in the end, many employers could in good faith find themselves
4 exposed to the Act's harsh sanctions because they did not know when to comply. The
5 risk of catastrophic loss to other employers from a confusion-causing injunction
6 outweighs the minimal cost to Plaintiffs from compliance.

7 The harm of confusion would be multiplied by the legal uncertainty about whether
8 an injunction that restrains an officer's conduct would grant anyone any long-term
9 protection. It is only certain that an injunction would prevent the commencement or
10 maintenance of enforcement proceedings until the injunction is lifted. If the injunction
11 were lifted, the county attorneys would not be barred from bringing future proceedings
12 for violations that occurred during the term of the temporary injunction, and it is unsettled
13 whether the interim injunction would be a defense to the later enforcement actions.
14 *Edgar v. MITE Corp.*, 457 U.S. 624, 630 (1982) (noting that the issue is unresolved);
15 *Farmers Union Cent. Exch. v. Thomas*, 881 F.2d 757, 760 (9th Cir. 1989) (whether the
16 interim injunction is a defense would have to be decided in the later enforcement action
17 itself). These are risks with grave consequences to the public, even if Plaintiffs are
18 willing to take them.

19 3. People disagree whether the great number and continuing flow of
20 unauthorized workers into the United States has more benefits than costs. But no one can
21 disagree that the costs and benefits accrue differently to different people in our society. It
22 is the responsibility of our elected representatives in Congress and in our legislatures to
23 strike the balance among those competing social and economic interests. It is the
24 responsibility of the courts to implement the balance as it has been struck, until it is struck
25 differently. *See Bery v. City of New York*, 97 F.3d 689, 694 (2d Cir. 1996).

26 The balance now struck is in favor of an economy for those who may work in the
27 United States. *See Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1011 (9th Cir. 2007)
28 (quoting H.R. Rep. 99-682(I), at 46, *as reprinted in* 1986 U.S.C.C.A.N. at 5650) ("In

1 passing IRCA, Congress wished to stop payments of wages to unauthorized workers,
2 which act as a ‘magnet . . . attract[ing] aliens here illegally,’ and to prevent those workers
3 from taking jobs that would otherwise go to citizens.”). The benefits in fact to those who
4 come to this country against the law to make better lives for themselves, to those who
5 save from lower cost labor and general depression of wages from employing unauthorized
6 aliens, and to those who enjoy the products of unauthorized labor at lower prices, do not
7 count. The beneficiaries chosen identically by federal and Arizona law prevail over all
8 who benefit from unauthorized alien labor.

9 Suspension of the Act, whether for a month or for the years it could take to
10 conclude an appeal, would defeat the public interest as chosen by the Legislature and as
11 permitted by Congress. If there is room for debate about the means Congress has
12 permitted to states, there is none about whether Congress and the Legislature have
13 vindicated the same substantive policies.

14 4. Those who suffer the most from unauthorized alien labor are those whom
15 federal and Arizona law most explicitly protect. They are the competing lawful workers,
16 many unskilled, low-wage, sometimes near or under the margin of poverty, who strain in
17 individual competition and in a wage economy depressed by the great and expanding
18 number of people who will work for less. (Facts Ex. 22I at 1.) (“[T]he U.S. Commission
19 on Immigration Reform reported . . . [that] illegal immigration, can have adverse
20 consequences by helping to depress wages for low-skilled workers and creating net fiscal
21 costs for state and local governments.”). *See also De Canas v. Bica*, 424 U.S. 351,
22 357–58 (1976) (“Employment of illegal aliens in times of high unemployment deprives
23 citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on
24 substandard terms as to wages and working conditions can seriously depress wage scales
25 and working conditions of citizens and legally admitted aliens; and employment of illegal
26 aliens under such conditions can diminish the effectiveness of labor unions.”); *Incalza*,
27 479 F.3d at 1011.

28 If the Act is suspended, whether for a month or for years, the human cost for the

1 least among us, measured by each person's continued deprivation, multiplied by their
2 number, will be a great quantum. Even if the injunction is lifted later, their loss will
3 never be paid back. Against all this, Plaintiffs suffer only the expense of having their
4 computer staff log some more hours, with off-setting business benefits as well, and
5 helping authorized workers clear up their records. This is not a sharp tipping of the
6 balance of hardships in favor of Plaintiffs. The balance does not even tip in their
7 direction.

8 **C. Pendency of a Jurisdictionally Sound Fresh Action Against Proper**
9 **Parties, Ready for a Preliminary Injunction Ruling in January, Weighs**
10 **Against an Appeal Injunction in the Weeks Before Then**

11 Plaintiffs' inexplicable failure to join one or more county attorneys as defendants
12 when warned about it in September weighs heavily against a jurisdictionally infirm merits
13 injunction in this appeal. Plaintiffs could have joined them with trivial expense and no
14 delay. They took a profitless gamble in ignoring the need for a county attorney
15 defendant, and their urgency is of their own making. Plaintiffs' newly filed action,
16 *Arizona Contractors II*, seeks identical relief against the proper defendants and will result
17 in an appealable preliminary injunction ruling as soon as January. That tips the balance
18 of hardships more strongly against them on their requests for interim injunctive relief.

19 **IV. Likelihood of Success on the Merits**

20 **A. Jurisdictional and Justiciability Issues**

21 The court sees little prospect of success on appeal on any of Plaintiffs' alleged
22 justiciable injuries except the one injury the court found sufficient. That ground is that
23 the operation of the Act coerces Plaintiffs to endure economic injury from use of E-
24 Verify. (Doc. # 87 at 18–21.) That issue has some novel aspects (*id.* at 18, 20) and is
25 based on fears grounded in credible but not certain interpretations of the Act and of
26 federal law. It is subject to fair debate. Plaintiffs could lose ground if the court of
27 appeals has a different understanding of that issue.

28 The court resolved only one debatable question of justiciability against Plaintiffs.
It held that it could provide no redress against the Attorney General, since only county

1 attorneys have the enforcement power that forces Plaintiffs to use E-Verify. Having
2 considered Plaintiffs' further briefing on their pending motions, the court remains of the
3 view that Plaintiffs misunderstand the redressability requirement for justiciability in cost-
4 of-compliance injury cases. They appear to think that since a declaratory judgment
5 invalidating the Act would help them, it matters little whom the declaratory judgment
6 runs against. This expansion of coercive relief to officers in the umbras and penumbras
7 of those with the actual power that harms would take the redressability requirement into
8 fictions. It would threaten, and perhaps step across, the Eleventh Amendment boundaries
9 on the jurisdiction of federal courts. *See, e.g., Okpalobi v. Foster*, 244 F.3d 405 (5th Cir.
10 2001) (en banc); *Snoeck v. Brussa*, 153 F.3d 984 (9th Cir. 1997). Giving leeway to the
11 abstractions and difficulty that attend questions of justiciability, the court still concludes
12 that it is unlikely that Plaintiffs will sustain this contention or their claim of subject matter
13 jurisdiction against these Defendants.

14 Because Plaintiffs are not likely to succeed on their jurisdictional appeal, and an
15 injunction pending appeal is not necessary to avoid loss of appellate jurisdiction, they
16 have a much heightened burden to warrant an injunction.

17 **B. The Immigration Reform and Control Act Expressly Authorizes,**
18 **Rather Than Preempts, the Licensing Sanctions in the Act**

19 The court also must assess Plaintiffs' likelihood of success on the merits,
20 assuming they prove jurisdiction in this appeal, for the relief they seek in these motions is
21 on the merits of their claims. Because the court has found that the balance of hardships
22 tips strongly in favor of the Defendants, Plaintiffs bear a high burden to prove that the
23 statute is most likely invalid. They have not shown a likelihood of success on the merits,
24 much less a strong likelihood.

25 The Supremacy Clause of the United States Constitution gives Congress the power
26 to exclude state legislation in a field as Congress defines it. Any analysis of state
27 authority "begin[s] with the axiom that, under our federal system, the States possess
28 sovereignty concurrent with that of the Federal Government, subject only to limitations

1 imposed by the Supremacy Clause.” *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).
2 Preemption analysis does not infer that “Congress ha[s] deprived the States of the power
3 to act.” *Affordable Hous. Found., Inc. v. Silva*, 469 F.3d 219, 238 (2d Cir. 2006) (quoting
4 *N.Y. Tel. Co. v. N.Y. State Dep’t of Labor*, 440 U.S. 519, 540 (1979)). The analysis
5 “start[s] with the assumption that the historic police powers of the States were not to be
6 superseded by the Federal Act unless that was a clear and manifest purpose of Congress.”
7 *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator*
8 *Corp.*, 331 U.S. 218, 230 (1947)). The intent of Congress is the “touchstone” of any
9 preemption analysis, *Retail Clerks Int’l Ass’n v. Schermerhorn*, 375 U.S. 96, 103 (1963),
10 and there is generally a “strong presumption against finding that state law is preempted by
11 federal law,” *Comm. of Dental Amalgam Mfrs. & Distribs. v. Straton*, 92 F.3d 807, 811
12 (9th Cir. 1996) (citing *Chem. Specialties Mfrs. Ass’n, Inc. v. Allenby*, 958 F.2d 941, 943
13 (9th Cir. 1992)).

14 Field preemption can be “explicitly stated in the statute’s language or implicitly
15 contained in its structure and purpose.” *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S.
16 88, 98 (1992) (plurality opinion) (citations omitted). Implied field preemption exists
17 where “the scheme of federal regulation is ‘so pervasive as to make reasonable the
18 inference that Congress left no room for the States to supplement it.’” *Id.* (quoting *Fid.*
19 *Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982)).

20 A state law may also be “preempted” if it conflicts with a federal law, but that
21 simply means that federal law is supreme over any contrary state law. Conflict
22 preemption is present when “compliance with both State and federal law is impossible, or
23 when the state law ‘stands as an obstacle to the accomplishment and execution of the full
24 purposes and objectives of Congress.’” *Mich. Canners & Freezers Ass’n, Inc. v. Agric.*
25 *Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984) (quoting *Hines v. Davidowitz*, 312
26 U.S. 52, 67 (1941)). A mere difference between state and federal law is not conflict. *Fla.*
27 *Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963).

28 Before the Immigration Reform and Control Act of 1986 (“IRCA”), 8 U.S.C. §

1 1101, *et seq.*, there was no express or implied field preemption of state laws prohibiting
2 the employment of unauthorized aliens. *De Canas v. Bica*, 424 U.S. 351 (1976). In *De*
3 *Canas v. Bica*, a California statute prohibited employers from hiring aliens who were not
4 entitled to lawful residence in the United States if the employment would adversely affect
5 lawful resident workers. The Supreme Court held that the state law was not preempted
6 because it did not regulate immigration or regulate in a field that the federal government
7 had occupied. It did not decide whether the California law conflicted with any specific
8 federal law. *Id.* at 358–64. Like the California law, the Act does not regulate
9 immigration because it does not determine “who should or should not be admitted into the
10 country, and the conditions under which a legal entrant may remain.” *Id.* at 355. *De*
11 *Canas* sets the framework for implied preemption analysis of unauthorized alien
12 employment laws.

13 **1. The Plain Language of 8 U.S.C. § 1324a(h)(2) Authorizes State**
14 **Licensing Sanctions**

15 Congress left no room in IRCA for courts to infer field preemption; it expressly
16 preempted some state powers and expressly affirmed other state powers. Section
17 1324a(h)(2) of Title 8, U.S.C., provides:

18 The provisions of this section [8 U.S.C. § 1324a] preempt any State or local
19 law imposing civil or criminal sanctions (*other than through licensing and*
similar laws) upon those who employ, or recruit or refer for a fee for
employment, unauthorized aliens.

20 (Emphasis added.) The task at hand is to give fair meaning to this express permission of
21 sanctions by “licensing and similar laws” upon “those who employ . . . unauthorized
22 aliens.” The task is not to wonder whether field preemption could be found in IRCA’s
23 structure if Congress had not expressly condoned state licensing sanctions.

24 Consistent with IRCA, the Act authorizes suspension or revocation of business
25 licenses for conduct that is also prohibited by IRCA. A.R.S. § 23-212(A) and (F). The
26 Act falls within the plain meaning of IRCA’s safe harbor for “licensing and similar laws.”
27 8 U.S.C. § 1324a(h)(2). That is enough to defeat this facial challenge. A facial challenge
28 to a law must prove that “no set of circumstances exists under which [the law] would be

valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987).¹

The Act’s definition of licenses that may be suspended or revoked comes within the plain meaning of “licensing” as IRCA uses it. “License” means any state or local “authorization that is required by law and that is issued . . . for the purposes of operating a business in this state.” A.R.S. § 23-211(7)(a). It includes articles of incorporation, a certificate of partnership, a foreign corporation registration, and a transaction privilege (sales) tax license, but not a professional license.² A.R.S. §§ 23-211(7)(b) and (c). Plaintiffs’ further argument that Congress could not have meant to permit the grave sanction of license suspension or revocation again fights the most obvious meaning of the words Congress used.

2. The Licensing Sanction Authorization is Not Conditioned on Completed Federal Proceedings Against the Violator; the Legislative History Does Not So State and Could Not Defeat the Statutory Language if it Did

Plaintiffs contend that the § 1324a(h)(2) authorization of state licensing sanctions only authorizes states to enforce the federal sanctions of IRCA and, of course, states cannot do that because only the Attorney General of the United States can commence federal enforcement proceedings. Defendants rephrase this argument, without changing its substance, as contending that states may only impose further licensing sanctions on employers who already have been found liable in completed federal proceedings under IRCA.

This interpretation would reduce the express authorization of state “licensing and

¹ For example, only an individual adjudicated to have violated the Act could raise a challenge that the ancillary remedy of ordering dismissal of all unauthorized aliens exceeds the safe-harbor of § 1324a(h)(2). No Plaintiff stands in that place yet. If a non-essential part of the Act did fall in a proper case, the rest still would stand. 2007 Ariz. Sess. Laws, ch. 279, § 5 (severability clause).

² Whether the Act’s definition of license is too broad in some particulars is an as-applied challenge that must await a case and a plaintiff threatened to lose what he contends is not a “license” within the meaning of 8 U.S.C. § 1324a(h)(2).

1 similar laws” to nothing. It is wholly without textual basis in the statute. Plaintiffs base
2 their argument on a sentence in the House Judiciary Committee Report on IRCA. H.R.
3 Rep. No. 99-682(I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662. The
4 legislative history does not substantiate Plaintiffs’ interpretation, but even if it did, it
5 could not change the statute or add words. The language of the statute that Congress
6 approved, not language from the House Report concerning the statute, controls. *Exxon*
7 *Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (“[T]he authoritative
8 statement is the statutory text, not the legislative history.”); *Hoffman Plastic Compounds,*
9 *Inc. v. NLRB*, 535 U.S. 137, 150 n.4 (2002) (describing House Report No. 99-682 as a
10 “single Committee Report from one House of a politically divided Congress” and noting
11 that the dissent’s reliance on the report “is a rather slender reed”); *Sprietsma v. Mercury*
12 *Marine*, 537 U.S. 51, 62–63 (2002) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S.
13 658, 664 (1993)) (asserting that express preemption analysis focuses on the plain wording
14 of the statute, “which necessarily contains the best evidence of Congress’ pre-emptive
15 intent.”). Based on the plain statutory language, no prior federal enforcement action is
16 necessary before a state may impose sanctions against an employer’s license, and the field
17 preemption inquiry ends there.

18 In any event, the legislative history, and the House Report in particular, do not
19 compel the meaning Plaintiffs urge. After the *De Canas* decision, Congressional bills
20 calling for federal employer sanctions began to contain preemption clauses for the first
21 time. *See, e.g.*, S. 2252, 95th Cong. § 5 (1976); H.R. 9531, 95th Cong. § 5 (1976). None
22 passed.

23 The March 1, 1981 final report and recommendation of the Select Commission on
24 Immigration and Refugee Policy recommended that any attempt at immigration reform
25 provide sanctions for employers who knowingly hire undocumented immigrants, but the
26 report did not recommend federal preemption of complementary state laws. In following
27 sessions of Congress, bills were introduced based on the recommendations of the Select
28 Commission, but they included preemption clauses similar to that in the bills from the

1 95th Congress. *See* S. 1765, 97th Cong. (1981); H.R. 4832, 97th Cong. (1981); S. 2222,
2 97th Cong. (1982); H.R. 5872, 97th Cong. (1982); S. 529, 98th Cong. (1983); H.R. 1510,
3 98th Cong. (1983). Again, none passed.

4 In the 99th Congress, S. 1200 and H.R. 3810 contained preemption clauses that for
5 the first time included the exception “other than through licensing and similar laws.”
6 Unlike the earlier bills, S. 1200 was enacted and became the Immigration Reform and
7 Control Act of 1986. The Senate Judiciary Committee Report dated August 25, 1985, did
8 not comment on the express authorization of state licensing and similar laws, and the
9 Senate passed the bill on September 19, 1985. *See* S. Rep. No. 99-132 (1985). One of
10 four House Committee Reports, however, the House Judiciary Committee Report dated
11 July 16, 1986, did comment on the licensing exception to preemption:

12 The penalties contained in this legislation are intended to specifically
13 preempt any state or local laws providing civil fines and/or criminal sanctions on
the hiring, recruitment or referral of undocumented aliens.

14 They are not intended to preempt or prevent lawful state or local processes
15 concerning the suspension, revocation or refusal to reissue a license to any person
16 who has been found to have violated the sanctions provisions in this legislation.
Further, the Committee does not intend to preempt licensing or “fitness to do
17 business laws,” such as state farm labor contractor laws or forestry laws, which
specifically require such licensee or contractor to refrain from hiring, recruiting or
referring undocumented aliens.

18 H.R. Rep. No. 99-682(I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662
19 (“House Report”). The conference committee report said nothing about preemption. *See*
20 H. Conf. Rep. No. 99-1000 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5840. Therefore,
21 whatever the meaning of the House Judiciary Committee Report’s comment, it was not
22 before the Senate when it approved the bill.

23 The House Report also does not support Plaintiffs’ argument. Their interpretation
24 overlooks the first quoted sentence, which paraphrases the bill as preempting only state
25 “fines” and “criminal sanctions.” The Arizona Act imposes no fines or criminal
26 sanctions. Plaintiffs rely on the second quoted sentence, which no doubt correctly states
27 that state licensing processes are not preempted as to “any person who has been found to
28 have violated the sanctions provisions of this legislation.” But Plaintiffs go further and

1 assert that the example given in that sentence exhausts the entire meaning of the licensing
2 sanction authorization. The passage does not so state, and the very next sentence gives
3 further examples of permitted licensing sanction laws that are not tied to completed
4 federal violation proceedings. Though one could look for further light in the legislative
5 history (Plaintiffs acknowledged that they did not review the floor debates), one need
6 look only to the sentence after the one Plaintiffs rely upon to see that the House Report
7 does not bear the meaning they would give it.

8 Finally, if the House Report did mean what Plaintiffs contend, such an attempt to
9 override the plain language of the statute would be precisely the kind of excess that the
10 modern view of legislative history illegitimizes. The Members or their staff must write
11 amendments into the bill, not into the Report.

12 **C. The Act Does Not Conflict With IRCA**

13 As noted above, conflict preemption exists when “compliance with both State and
14 federal law is impossible, or when the state law ‘stands as an obstacle to the
15 accomplishment and execution of the full purposes and objectives of Congress.’” *Mich.*
16 *Canners & Freezers Ass’n Inc. v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 469
17 (1984). A mere difference between state and federal law is not conflict. *Fla. Lime &*
18 *Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963). Conflict preemption is not
19 implied absent an “actual conflict.” *English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990)
20 (citation omitted). “Tension between federal and state law is not enough to establish
21 conflict preemption.” *Incalza v. Fendi N. Am., Inc.*, 479 F.3d. 1005, 1009 (9th Cir. 2007)
22 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984)). In addition, “[w]here
23 state enforcement activities do not impair federal regulatory interests concurrent
24 enforcement activity is authorized.” *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th
25 Cir. 1983) (citing *Fla. Avocado Growers*, 373 U.S. at 142), *overruled on other grounds*
26 *by Hodgers-Durgin v. de la Vina*, 199 F.3d. 1037 (9th Cir. 1999).

27 In passing the federal laws that prohibit the employment of unauthorized aliens,
28 “Congress wished to stop payments of wages to unauthorized workers, which act as a

1 magnet . . . attract[ing] aliens here illegally, and to prevent those workers from taking jobs
2 that would otherwise go to citizens.” *Incalza*, 479 F.3d at 1011 (internal quotation marks
3 omitted) (holding that IRCA did not preempt California employment law). Likewise, the
4 Act aims to sanction the licenses of knowing employers of unauthorized aliens within the
5 express permission of 8 U.S.C. § 1324a(h)(2), and it does so without conflicting with
6 other federal laws.

7 Plaintiffs assert that Congress carefully selected the prohibitions, penalties,
8 procedures, and protections that properly balanced the competing policy objectives
9 surrounding passage of IRCA, and that any departure from those exact parameters by the
10 State necessarily stands as an obstacle to Congress’ full objectives. The argument that
11 Congress created an “integrated scheme,” any departure from which necessarily poses a
12 conflict, is an argument for implied field preemption. *See, e.g., Wisconsin Dept. of Indus.,*
13 *Labor and Human Relations v. Gould*, 475 U.S. 282, 288 (1986). As the court has
14 explained, the fact that Congress expressly allowed states to impose licensing sanctions
15 forecloses the argument that it impliedly occupied the same field. Since Plaintiffs’
16 proposed “conflicts” are all based on differences between the State and federal
17 procedures, not incompatibilities, those contentions are merely reworded arguments for
18 field preemption.

19 For example, Plaintiffs complain that the licensing penalties in the Act are more
20 severe than the penalties in the federal law. That argument ignores Congress’ express
21 approval of such state licensing penalties in 8 U.S.C. § 1324a(h)(2). Similarly, they note
22 that the Act’s definition of “employee” does not match exactly the federal definition. As
23 a matter of statutory construction, it is improbable that the Act’s definition requires
24 verification of persons who are exempted from IRCA such as casual hires and
25 independent contractors. An “employment relationship” is required. A.R.S. § 23-211(3).
26 Regardless, such a contention would at most narrow the Act and must be raised in an as-
27 applied challenge by such an employer rather than in this facial challenge. Nor does any
28 Plaintiff show it has the types of workers necessary to raise this challenge.

1 The Act does use a different adjudicatory process than IRCA, but conflict
2 preemption does not arise merely because state laws do not replicate federal laws and
3 procedures. The State's law probably would be invalid if it attempted to invoke IRCA's
4 hearing process for its own purposes, or if it attempted to make its own determination of
5 immigration status to affect a person's admissibility or deportability from the United
6 States. *See* 8 U.S.C. §§ 1229a(a)(1), 1229a(a)(3). Instead, the Act determines an
7 employee's eligibility to work in the United States for the purpose of imposing licensing
8 sanctions on an employer.

9 Such a determination does not decide "who should or should not be admitted into
10 the country," so it does not conflict with the federal government's regulation of
11 immigration. *De Canas*, 424 U.S. at 355. Nor is the State's procedure likely to conflict
12 with IRCA's procedure, because the State makes its determination in the exercise of the
13 power that Congress expressly left to it under 8 U.S.C. § 1324a(h)(2). *See Garrett v. City*
14 *of Escondido*, 465 F. Supp. 2d 1043, 1057 (S.D. Cal. 2006) (noting that states may make
15 a formal determination of an individual's alienage status for purposes authorized by
16 federal statute); House Report at 66–68, 1986 U.S.C.C.A.N. at 5670–72 (discussing the
17 states' responsibility to "verify whether alien applicants for certain public assistance
18 programs are in a lawful immigration status and thus eligible for participation"). States
19 must often determine an individual's immigration status to administer state laws that do
20 not conflict with federal laws. *See, e.g.,* A.R.S. § 36-2933 (eligibility for State health care
21 services); § 46-292 (eligibility for cash assistance); § 28-3153(D) (eligibility for a drivers'
22 license); Ariz. Const. art. II, § 22.A.4 (eligibility for bail); *Hernandez v. Lynch*, 167 P.3d
23 1264 (Ariz. Ct. App. 2007) (eligibility for bail).

24 Importantly, the State defers to the federal government's response to a lawful
25 request under 8 U.S.C. § 1373(c) to make this determination. It then ostensibly allows
26 the employer the opportunity to present evidence to rebut the federal government's
27 determination. *See* A.R.S. § 23-212(H) (according the federal government's
28 determination only a rebuttable presumption of accuracy); Ariz. R. Civ. P. 65.2 (requiring

1 an evidentiary hearing before sanctions may be imposed unless all parties waive the
2 hearing). This is harmonization with federal law, not conflict. The mere fact that the
3 parallel procedures could result in an employer being found in violation of the Act but not
4 IRCA does not establish conflict preemption. That is simply the result of the concurrent
5 enforcement activity in our federal system where Congress has specifically preserved
6 state authority.

7 When enacting IRCA, Congress sought to minimize undue burdens on employers.
8 The Act does not make employers conform to a stricter standard of conduct than the
9 federal law. Liability under both IRCA and the Arizona Act requires that, at a minimum,
10 the employer “knowingly” employ an unauthorized alien. 8 U.S.C. § 1324a(a)(1)(A);
11 A.R.S. § 23-212(A). Both statutes include procedures for weeding out frivolous
12 complaints, and under both statutes the enforcement official has ultimate discretion to
13 decide whether to bring an enforcement action in any given case. 8 U.S.C. § 1324a(e);
14 A.R.S. § 23-212(C).

15 Congress and the State of Arizona have enacted anti-discrimination laws.
16 Plaintiffs contend that Arizona’s reliance on those laws, rather than placing duplicate
17 provisions within the Act, conflicts with the federal policy of minimizing discrimination.
18 The Supremacy Clause is not that weak. Arizonans remain protected by the prohibitions
19 against such discrimination in IRCA itself. *See* 8 U.S.C. § 1324b (defining and
20 prohibiting unfair immigration-related employment practices). Those protections
21 somewhat overlap the employment discrimination prohibitions found in federal and
22 Arizona law generally. 42 U.S.C. § 2000e-2 (prohibiting discrimination based on “race,
23 color, religion, sex, or national origin”); A.R.S. § 41-1463(B) (prohibiting employment
24 discrimination based on “race, color, religion, sex, age, disability or national origin”).
25 Moreover, the Act provides that it “shall not be construed to require an employer to take
26 any action that the employer believes in good faith would violate federal or state law.”
27 A.R.S. § 23-213. There is no conflict with the federal goal of discouraging discrimination
28 because the Act does not authorize, encourage, or even allow discrimination; nor does it

1 deprive any worker of the express federal protections.

2 In sum, Plaintiffs have little chance of prevailing on their conflict preemption
3 argument. They simply note differences between IRCA and the Arizona Act.
4 Differences are bound to arise where Congress has left it to the states to regulate a given
5 area concurrently with the federal government.

6 **D. Required Participation in E-Verify as Part of a State Licensing**
7 **Sanction Program Permitted by 8 U.S.C. § 1324a(h)(2) is Not in**
8 **Conflict With or Pre-Empted by Federal Law**

9 Because use of E-Verify is voluntary under federal law, Plaintiffs assert that the
10 State's requirement that all employers check the employment eligibility of new hires
11 through E-Verify is invalid under implied field preemption and conflict preemption.
12 Neither the Illegal Immigration Reform and Immigrant Responsibility Act of 1996
13 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-655 (Sept. 30, 1996), nor the Basic Pilot
14 Program Extension and Expansion Act of 2003 ("Expansion Act"), Pub. L. No. 108-156,
15 117 Stat. 1944 (Dec. 3, 2003), requires such a conclusion.

16 Congress' purpose for creating E-Verify was to experiment with a system to
17 improve employers' ability to verify the work authorization of new hires beyond the I-9
18 system. The program was in an evaluative stage when it was created, and so Congress
19 was leery of mandating its use right away itself. Accordingly, it prohibited the Attorney
20 General from requiring participation in the program. IIRIRA § 402(a), 110 Stat.
21 3009-656. But that does not necessarily mean that Congress placed the conduct that it
22 excluded from federal mandate — whether to use E-Verify — also outside of the
23 residuum of conduct subject to the police power of the state. A decision not to invoke
24 federal coercive powers leaves conduct within the power of the states to compel or forbid
25 for proper legislative purposes.

26 Unlike the regulation in *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000),
27 nothing in the statutory text or history suggests that Congress intended to vest employers
28 with an individual right, good against the states' police power, to choose whether or not
to participate in E-Verify. The federal statute in *Geier* sought to create a marketplace of

1 individual choices from which better mixes of automobile safety and economy could
2 emerge. *Id.* at 874–75. When a California law mandated one choice, it defeated the
3 federally preferred marketplace. In contrast, federal policy encourages the utmost use of
4 E-Verify, not individual autonomy for the sake of some higher federal goal.

5 Congress did not cap participation levels. It allowed all employers in the
6 authorized states to use the program. Later, the Expansion Act opened participation to
7 employers in all fifty states. The federal government undertook advertising campaigns to
8 increase participation levels and utilize the excess capacity available. (Facts Ex. 11 at 10.)
9 Notably, no party has submitted evidence that the federal government officers who
10 administer E-Verify view the state requirement as an obstruction. To the contrary, the
11 current administration and the DHS Secretary have endorsed making E-Verify mandatory
12 for all employers nationally. (Facts Ex. 15 at 8.) All of this proves that the federal
13 government encourages increased participation in E-Verify; it does not support an
14 inference that federal policy leaves no room for the states to supplement federal
15 requirements by mandating that employers use E-Verify. Plaintiffs’ failure to present
16 evidence from federal officers that the required Arizona participation in E-Verify is
17 unwelcome is highly damaging to their case.

18 Arizona’s requirement will increase the volume of registered employers and the
19 number of inquiries processed through E-Verify. But Congress encourages state and
20 federal authorities to communicate regarding immigration status. *See* 8 U.S.C. § 1373(a);
21 8 U.S.C. § 1644. Requiring Arizona employers to check employment eligibility through
22 E-Verify does not abuse the system for a purpose that Congress did not intend. E-Verify
23 was created for precisely that purpose. Furthermore, Arizona’s use of E-Verify is for a
24 licensing sanctions program authorized by Congress in section 1324a(h)(2) of IRCA.
25 Therefore, *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1057 (S.D. Cal. 2006),
26 which found a conflict where the federal government was burdened by an inappropriate
27 use of its program, does not apply. The fact that the Act will result in additional inquiries
28 to the federal government is consistent with federal law.

1 The federal government, of course, retains the ability to terminate an employer's
2 use of E-Verify or to discontinue the E-Verify program entirely. Despite Plaintiffs'
3 concerns that such an occurrence would force employers into non-compliance with State
4 law, there is no reason to think that the government would exclude users except for their
5 own misconduct. If E-Verify ceases to exist, there will be time enough to deal with that
6 currently imaginary case.

7 Arizona's decision to require employers to use E-Verify is an attempt to coordinate
8 State efforts to reduce the hiring of unauthorized aliens through licensing sanctions with a
9 federal government program that has the same goal. It does not stand as an obstacle, but
10 rather an aid to achieving the federal government's purposes and objectives in a realm
11 explicitly left open to the states.

12 **E. Procedural Due Process**

13 **1. Preclusion of the Employer's Evidence Concerning Whether the** 14 **Employee Is Authorized Would Raise a Serious Question of** **Procedural Due Process**

15 Under both the federal and State constitutions, procedural due process requires that
16 a party have an opportunity to be heard "at a meaningful time and in a meaningful
17 manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*,
18 380 U.S. 545, 552 (1965)). Due process requires notice that is reasonably calculated
19 under all of the circumstances to apprise interested parties of the pendency of the action
20 and afford them the opportunity to present their objections. *Mullane v. Cent. Hanover*
21 *Bank & Trust Co.*, 339 U.S. 306, 314 (1950). It also requires "a fair trial in a fair
22 tribunal." *In re Murchison*, 349 U.S. 133, 136 (1955); *United States v. Superior Court*,
23 144 Ariz. 265, 280, 697 P.2d 658, 673 (1985). Due process "is flexible and calls for such
24 procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334
25 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

26 The Act raises a serious question of procedural fairness to employers charged with
27 knowingly or intentionally employing an unauthorized alien. It provides the following
28 concerning Superior Court proceedings under the Act:

1 On determining whether an employee is an unauthorized alien, the court
2 shall consider only the federal government's determination pursuant to 8
3 United States Code section 1373(c). The federal government's
4 determination creates a rebuttable presumption of the employee's lawful
5 status. The court may take judicial notice of the federal government's
6 determination and may request the federal government to provide
7 automated or testimonial verification pursuant to 8 United States Code
8 section 1373(c).

9 A.R.S. § 21-212(H). This subsection is somewhat at war with itself. On the one hand,
10 the Superior court "shall consider only" the federal government's determination. But on
11 the other hand, that determination only creates "a rebuttable presumption," meaning that
12 other evidence may be considered.

13 Unless there has already been an opportunity for fair and adequate determination
14 of the employee's work authorization, the Superior Court proceeding must supply that
15 fair and adequate procedure. A procedure that bars all evidence from the employer on an
16 essential element plainly would fall short of due process of law. If this were the case,
17 Plaintiffs would have made a very substantial showing that the Act's procedure is
18 probably unconstitutional.

19 However, that is probably not the meaning of subsection (H). It parallels
20 subsection (B), which prohibits enforcing officers from "independently making a final
21 determination on whether an alien is authorized to work in the United States" apart from
22 the government's § 1373(c) response. Subsections (B) and (H) are meant to protect
23 workers from being the direct subject of investigation and enforcement under the Act.
24 But where the employer is on trial, the § 1373(c) determination creates only a rebuttable
25 presumption — meaning that the employer may present any evidence to prove the
26 employee's lawful status and the employer's lack of knowledge. It is only the State that
27 is prohibited from investigating workers directly and from offering extrinsic evidence of
28 their status.

This reconciliation of these difficult statutory passages has the virtues of making
sense, being fair to the employer, and avoiding unconstitutionality. *See Mejak v.*
Granville, 212 Ariz. 555, 557, 136 P.3d 874, 876 (2006) ("[I]n interpreting a statute, this

1 Court must . . . give effect to every provision in the statute . . . [and] interpret the statute
2 so that no provision is rendered meaningless, insignificant, or void.”); *Business Realty v.*
3 *Maricopa County*, 181 Ariz. 551, 559, 892 P.2d 1340, 1349 (1995) (“We interpret
4 statutes to uphold their constitutionality, if that is possible. As a corollary, we strive to
5 give statutes meanings that avoid serious constitutional issues. We reach those only when
6 absolutely necessary.”). Defendants point out that because the Superior Court must
7 adjudicate whether the employer “knowingly” or “intentionally” employed an
8 unauthorized alien, “a judge will consider arguments and evidence that go to essential
9 elements of the Act.” (Doc. # 58 at 22 and n. 17.) Since that includes considering all the
10 employer’s evidence on whether the employee was an unauthorized alien, not just the
11 government’s § 1373(c) response, procedural due process will likely be afforded to
12 employers. *See* Ariz. R. Civ. P. 65.2 (requiring an evidentiary hearing before sanctions
13 under the Act may be imposed unless all parties waive the hearing).

14 Plaintiffs also argue that under § 1373(c) the government does not make a
15 “determination” of the employee’s “lawful status” to work. The government’s response
16 gives “the citizenship or immigration status” of a person. 8 U.S.C. § 1373(c). It is not
17 clear that a response failing to confirm an employee’s “lawful status” is a “determination”
18 that the employee lacks lawful status. In some circumstances, it may be that the
19 government’s response of non-confirmation means little in its own right. However, if the
20 government’s response fails to give enough information to determine an employee’s work
21 authorization, the State’s case fails. It does not mean that the employer is sanctioned
22 anyway. These questions are not adequately explored in this record.

23 Furthermore, Plaintiffs have not shown that the government’s response under 8
24 U.S.C. § 1373(c) will exclude an interactive process like that employed in E-Verify. That
25 process is fair, prompt, adequate, and provides opportunity to be heard. (Facts, Ex. 13,
26 App. C at C-2.) Errors in the government’s database concerning authorized workers can
27 be corrected. This record does not show what the government does or would do if the
28 State or the Superior Court requests such interactive and error-correcting processes under

1 § 1373(c). Plaintiffs fall short of proving that “no set of circumstances exists under which
2 [the Act] would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987). Perhaps
3 this shortfall can be made up in the second case, *Arizona Contractors II*.

4 Moreover, the issue is not ripe, as it could arise only in a Superior Court
5 enforcement proceeding, which no Plaintiff faces and which could not happen before
6 preliminary injunctive relief will be considered in *Arizona Contractors II* in January.
7 Finally, if § 23-212(H) does unconstitutionally bar an employer from offering evidence, it
8 would be voided and severed, leaving the rest of the Act standing.

9 Though Plaintiffs have raised a substantial issue, they have not met their burden of
10 showing a strong likelihood of success on this issue.

11 **2. The Superior Court Process Is Fair and Adequate**

12 Plaintiffs’ other procedural due process challenges have no merit. The other
13 Superior Court processes are subject to all the procedural protections of the Arizona
14 Rules of Civil Procedure. Since the Superior Court has full evidence-taking, fact-finding,
15 and discretionary authority on these issues, with the burden of proof on the State, there
16 can be no due process right to participate in the enforcing officer’s investigation and
17 preparation of his case (though civil enforcement proceedings are rarely brought without
18 first contacting the defendant).

19 The Act nowhere says that county attorneys must prosecute all non-frivolous
20 cases, or ones motivated by discrimination. Plaintiffs’ other procedural fears are
21 improbable. If they ever arose in a real case, they could be decided, but there are no real
22 facts here and the Act is not deficient on its face.

23 **F. Other Contentions**

24 The Plaintiffs in No. CV 07-1355 raise other contentions that call only for brief
25 comment.

26 The Act does not purport to reach the out-of-state employees of Arizona
27 employers; therefore it does not implicate the Commerce Clause. The county attorney
28 can bring an enforcement action only “in the county where the unauthorized employee is

1 employed.” A.R.S. § 23-212(D).

2 Plaintiffs have no substantive due process right to employ unauthorized aliens or to
3 refuse lawful precautions against doing so. This is not a separate argument but a
4 restatement of the federal preemption and procedural due process contentions.

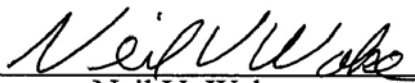
5 The Act does not violate the separation of powers principle of Art. III of the
6 Arizona Constitution and does not have the improbable meanings Plaintiffs would give it
7 to implicate that principle.

8 **V. Conclusion**

9 For the foregoing reasons, Plaintiffs have failed to make a sufficient showing for
10 an injunction pending appeal.

11 IT IS THEREFORE ORDERED that the motions for injunction pending appeal
12 (Doc. ## 91 and 94) are denied.

13 DATED this 21st day of December 2007.

14
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16 _____
Neil V. Wake
United States District Judge

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